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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

PEBBLE LIMITED PARTNERSHIP,

Plaintiff,

vs.

ENVIRONMENTAL PROTECTION AGENCY, *et al*.,

Defendants.

/

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

CIVIL ACTION NO. 3:14-cv-00171 HRH

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I. INTRODUCTION

This case involves an important public interest in assuring that, when exercising its power, the federal government acts in an open, even-handed way, taking fully into account the interests of everyone who may be affected. When the government fails to exercise its power openly and even-handedly—when it makes decisions and develops policy behind closed doors, influenced by agenda-driven special interests—then the exercise of power loses its legitimacy, and confidence in government is undermined.

One important protection that assures open and even-handed governmental decision-making is the Federal Advisory Committee Act, 5 U.S.C. App. II §§ 1-16. Through its requirements of open meetings, public participation, and balanced membership, FACA guards against the Executive Branch's use of "advisory committees" that act outside the public's view and thus risk influencing federal decision-makers with biased proposals guided by the agendas of special interests. In this case, the Environmental Protection Agency and its Administrator sought the advice and recommendations of outside advisory committees—the Anti-Mine Coalition, the Anti-Mine Scientists, and the Anti-Mine Assessment Team—composed entirely of special interests who secretly assisted EPA in developing and executing a carefully orchestrated plan to prevent Plaintiff from exercising its rights to develop the Alaskan mineral interests that it owns. Defendants have violated FACA in every respect—from the formation of these three *de facto* advisory committee to every aspect of their operations—and have thus undermined the important interests that this federal law was enacted to protect.

Plaintiff filed this case under FACA, seeking declaratory and injunctive relief to prevent Defendants from proceeding any further with its pending action under § 404(c) of the federal

Clean Water Act, 33 U.S.C. § 1344(c), in the absence of full and complete compliance with FACA's requirements. Defendants have moved to dismiss.

On November 24, 2014, shortly after the case was filed, the Court entered a preliminary injunction against Defendants, holding that Plaintiff "has demonstrated a fair chance of success on the merits—at least raising a question serious enough to justify litigation" with respect to the third advisory committee—the Anti-Mine Assessment Team. Preliminary Injunction Order at 1-2. That ruling would logically imply that Plaintiff has at the very least stated a claim, but Defendants now argue that Plaintiff has no standing to sue under FACA and that the First Amended Complaint fails to state a claim upon which relief can be granted. Defendants are wrong in both respects, not only because they misconstrue the substantive law that governs, but also because their motion necessarily asks the Court to resolve factual disputes contrary to the black-letter rule that, on a motion to dismiss, Plaintiff's allegations must be taken as true.

Plaintiff's First Amended Complaint alleges facts showing that:

(1) EPA "established or utilized" the Anti-Mine Coalition, the Anti-Mine Scientists, and the Anti-Mine Assessment Team and that these groups constitute "advisory committees" as defined under the governing law;

(2) EPA did so "in the interest of obtaining advice or recommendations" in connection with the agency's plan to use § 404(c) to veto the Pebble Mine;

(3) EPA failed to comply with any of FACA's procedural requirements; and

(4) Plaintiff's interests under FACA, as well as its economic interest in the development of the mineral rights that it holds, were harmed.

Not only do these allegations establish that Plaintiff has standing, but they plainly state a claim under FACA. Of course, whether the Court ultimately finds the facts to be as Plaintiff has

alleged them is not relevant to a motion to dismiss; the only questions now are whether Plaintiff has standing and whether it has stated a claim. On those questions, Defendants' motion should be denied.

II. CONGRESS ENACTED FACA TO PROHIBIT BIASED ADVISORY COMMITTEES AND CLOSED-DOOR, SECRETIVE MEETINGS

Defendants' arguments are made against the backdrop of their overly restrictive view that FACA is little more than a cost-cutting statute, enacted "to reduce the growing cost of unnecessary blue ribbon commissions, advisory panels, and honorary boards set up by the government to advise the President and federal agencies." Mem. of Law in Supp. of Defs.' Mot. to Dismiss at 5 (hereinafter "Defs.' Mot."). That Congress was concerned with the proliferation of redundant and wasteful advisory groups is certainly true. But, more importantly, Congress also saw a need to address the far more insidious problem caused by advisory groups that too often operated without meaningful public scrutiny and that too frequently consisted of special interest groups that improperly influenced important governmental policymaking. FACA's legislative history underscores this key point:

> One of the great dangers in this unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns. Testimony received at hearings before the Legal and Monetary Affairs Subcommittee pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests.

H.R. Rep. No. 92-1017, at 132 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3496. The Senate was of the same view. Thus, provisions mandating that the membership of advisory committees be fairly balanced and not unduly influenced by special interests were included in FACA to counter "the belief that these [advisory] committees do not adequately and fairly represent the

public interest [or] that they may be biased toward one point of view or interest." S. Rep. No. 92-1098, at 5 (1972). As aptly put by Senator Charles Percy, "[v]iewed in its worst light, the federal advisory committee can be a convenient nesting place for special interests seeking to change and preserve a federal policy for their own ends. Such committees stacked with giants in their respective fields can overwhelm a federal decision maker, or at least make him wary of upsetting the status quo." 118 Cong. Rec. 30,276 (1972) (statement of Sen. Charles Percy).

The Supreme Court, too, has recognized that FACA is more than a mere cost-cutting measure. It was enacted "to enhance the public accountability of advisory committees" and to eliminate "biased proposals." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 453, 459 (1989); *see also Idaho Wool Growers Ass'n v. Schafer*, 637 F. Supp. 2d 868, 880 (D. Idaho 2009) (stating that Congress wished to "counter[] the fear that advisory committees would be dominated by representatives of industry and other special interest groups seeking to advance their own agendas." (citing *Pub. Citizen*, 491 U.S. at 453)). Indeed, to address the ills caused by committees comprised of individuals representing only one side of controversial matters that come before the Executive Branch, FACA requires that the membership of all advisory committees be "fairly balanced in terms of the points of view represented" and that appropriate measures be taken by federal agencies to "assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest." 5 U.S.C. App. II § 5(b)(2), (c).

FACA defines an "advisory committee" as

> any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . *established or utilized* by one or more agencies, *in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government*, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government . . . .

Id. § 3(2) (emphasis added).

On its face, this definition applies to any and all groups, not composed wholly of federal employees, that a federal agency "establishe[s]" or "utilize[s]" "in the interest of obtaining advice or recommendations." *Id*. Identifying a committee that has been "established" by an agency is typically straightforward. But a committee that is "utilized" by an agency (even if not formally established) also falls within FACA, and, in that regard, the Supreme Court in *Public Citizen* held that a committee is "utilized" when, for example, it is "amenable to . . . strict management by agency officials." 491 U.S. at 441.

Once an advisory committee is found to exist as defined by FACA—whether it was "established" or "utilized" by an agency—important procedural requirements regarding its form and function must be met. Accordingly, all federal advisory committees must

- be utilized solely for advisory functions, 5 U.S.C. App. II § 9(b),
- be chartered with Congress, *id.* § 9(c),
- have a fairly balanced membership in terms of the points of view represented and the functions to be performed, *id*. § 5(b)(2),
- give advice and recommendations that are not inappropriately influenced by the agency or by any special interest but which instead reflect the committee's independent judgment, *id*. § 5(b)(3), and

- provide adequate public notice of meetings, conduct them openly, and make available to the public all transcripts of meetings and documents used or generated by the committee in its work, *id*. §§ 10(a), (b), & 11(a).

III. PLAINTIFF HAS STANDING

Defendants' argument that this Court lacks subject matter jurisdiction rests on an overly restrictive view of the rights that FACA guarantees and the mistaken notion that the injuries alleged by Plaintiff have somehow been remedied as a matter of law in light of Plaintiff's "participation" in Defendants' allegedly open and transparent process in its handling of the Pebble Mine. Defendants' arguments lack merit.[1] Plaintiff has standing.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court held that a plaintiff has standing under Article III when (1) it has alleged an actual or imminent invasion of a concrete and legally protected interest, (2) a fairly traceable connection exists between the plaintiff's injury and the defendant's conduct, and (3) it is likely that the court can redress the injury by a decision in the plaintiff's favor. *Id*. at 560-61. In addition, standing to assert a federal statutory claim requires that the plaintiff's interests fall within the "zone of interests"

[1] Defendants rely on Fed. R. Civ. P. 12(b)(1) to make their standing argument. Because their argument appears to be directed more to whether Plaintiff's injury is in the "zone of interests" protected by FACA, it would seem to be more accurately categorized as a "statutory standing" argument that should fall under Rule 12(b)(6). *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199-200 (9th Cir. 2004) (addressing a statute's zone of interests as a question of statutory standing); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004) (statutory standing is not a jurisdictional question of whether there is case or controversy under Article III (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 (1998))); *Guerrero v. Gates*, 357 F.3d 911, 920-21 (9th Cir. 2003) (resolving statutory standing inquiry under Rule 12(b)(6)). Matters outside the complaint are thus not appropriately considered. It does not matter, however, whether Rule 12(b)(1) or 12(b)(6) is used; the issue is whether Plaintiff has alleged an injury sufficient to invoke the Court's subject matter jurisdiction and, as shown here, it has done so, irrespective of Defendants' claim that EPA's repeated failures to abide by FACA were somehow cured by its purportedly "transparent" public proceedings. Standing is a threshold issue; Defendants' "cure" argument, which has no merit in any event, would be relevant only to the Court's ultimate remedy after its full consideration of the merits.

sought to be protected by the statute. *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1499 (9th Cir. 1995). And when "procedural rights" are involved, as they are in this case, *Lujan* also makes clear that the requirements are relaxed, given that the relief typically sought in such cases (compliance with the procedures that had been breached) may not guarantee that the ultimate outcome will be favorable to the plaintiff:

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Lujan, 504 U.S. at 572 n.7. This is because, as one commentator put it, "[a] procedural right is created, not because it necessarily yields particular outcomes, but because it structures incentives and creates pressures that Congress has deemed important to effective regulation." Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 226 (1992) (cited with approval in *Pac. Nw. Generating Coop. v. Brown*, 38 F.3d 1058, 1065-66 (9th Cir. 1994)). "[S]o long as the procedures are designed to protect some threatened concrete interest [of the plaintiff,] that is the ultimate basis of [a plaintiff's] standing," *Lujan*, 504 U.S. at 573 n.8.

Likewise, the court of appeals in this circuit has held not only that standing can rest on a breach of procedural rights,[2] but also that a plaintiff alleging procedural noncompliance "can

[2] *See, e.g., Pac. Nw.*, 38 F.3d at 1065-66 (plaintiffs with an economic interest in preserving salmon have procedural interest in ensuring that the Endangered Species Act is followed);

proceed 'without meeting all the normal standards of redressability and immediacy.'" *Pac. Nw.*, 38 F.3d at, 1065 (quoting *Lujan*, 504 U.S. at 572 n.7). The litigant that asserts a violation of a procedural right "need only demonstrate that he has 'a procedural right that, if exercised, *could* protect [his] concrete interests and that these interests fall with the zone of interests protected by the statute at issue." *NRDC v. Jewell*, 749 F.3d 776, 783 (9th Cir. 2014) (emphasis in original) (citation omitted), *cert. denied*, 135 S. Ct. 676 (2014). Applying these requirements, it is clear that Plaintiff has standing under Article III and FACA.

First, Plaintiff has alleged that Defendants have violated FACA by establishing or utilizing three "advisory committees" that failed to comply with FACA's procedural mandates—mandates that Congress enacted to assure openness, public participation, *and* fairness. Furthermore, even though compliance with FACA ultimately may not guarantee that the outcome of a non-tainted § 404(c) proceeding would be favorable to Plaintiff (or that an injunction against use of the Bristol Bay Watershed Assessment ("BBWA") will necessarily affect the outcome), the injury asserted is, under *Lujan* and its progeny, sufficiently concrete. *See Lujan*, 504 U.S. at 572 n.7.

FACA's procedural requirements promote openness and fair balance with the goal of assuring that the advice and recommendations given by advisory committees to federal agencies are not inappropriately influenced by special interests. Those core interests were wholly undermined by the manner in which EPA staffed the three committees alleged here and by how

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Friends of the Earth v. U.S. Navy, 841 F.2d 927, 931-32 (9th Cir. 1988) (residents who live near site of proposed port have procedural standing to sue for Navy's alleged failure to follow permitting regulations); *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) (city located near proposed freeway interchange has procedural standing to challenge agency's failure to prepare an impact statement).

those committees operated outside of the public eye. Likewise, Plaintiff's specific interest in having EPA comply with a statute that ensures openness, public participation, and fair balance is self-evident. Plaintiff holds the mineral development rights to the Pebble Deposit, and any negative regulatory action under § 404(c) will have a profound and direct impact on those rights. Indeed, Plaintiff alleges that Defendants' FACA violations are substantially likely to lead to a negative regulatory action, precisely because the violations "stack the deck" against Plaintiff. That they have already done so in the form of a biased and scientifically flawed watershed assessment on which all future regulatory actions will, without the Court's intervention, be based further supports Plaintiff's argument that its injuries are both actual and imminent. To say that EPA's handling of the proceedings affecting Plaintiff's rights should be fair, open, and balanced is, therefore, to state the obvious.

Second, there can be no serious question that the impairment of Plaintiff's rights in this case is fairly traceable to Defendants' conduct. As alleged in the First Amended Complaint for Declaratory and Injunctive Relief (hereinafter "Amended Complaint" or "Am. Compl."), EPA established or utilized *de facto* advisory committees without complying with FACA, and the failure to comply with FACA led to a flawed and arbitrary watershed assessment that EPA is now using as the foundation of all subsequent proceedings under the Clean Water Act. No other parties violated FACA here; only Defendants did. The FACA violations are thus not the result of "the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560-61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Indeed, Plaintiff's alleged injuries are not only "fairly traceable to the defendant's allegedly unlawful conduct," *Allen v. Wright*, 468 U.S. 737, 751 (1984), they *directly resulted from* Defendants' conduct.

Third, even though the redressability requirement is relaxed in a "procedural rights" case such as this, *Lujan*, 504 U.S. at 572 n.7, there can be no question that Plaintiff's injuries are likely to be redressed by the relief that Plaintiff has requested. Plaintiff seeks a declaration that Defendants have violated FACA and a permanent injunction to preclude Defendants from proceeding under § 404(c) or from relying in any way on the BBWA until the agency and any subsequent watershed assessment are brought into full compliance with FACA. Again, whether compliance will in fact change the outcome is not the issue for purposes of determining standing. That point has been made clear by the Supreme Court in *Lujan:*

> [O]ne living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, *even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered . . . .*

Lujan, 504 U.S. at 572 n.7; *see also Pac. Nw.*, 38 F.3d at 1065; *Idaho Farm Bureau Fed'n v. Babbitt*, 900 F. Supp. 1349, 1364 (D. Idaho 1995) (holding that plaintiff had standing to sue under FACA without a showing of a causal connection between their injury and defendant's conduct or that the requested remedy would redress that injury; "'Congress has linked [FACA's procedures] causally' to unbiased recommendations." (quoting *Pac. Nw.*, 38 F.3d at 1065)). The question relevant to standing in this case is whether Plaintiff's injuries—*i.e.*, the violations of FACA and the consequences that flow directly from those violations, such as the preparation of the patently biased BBWA—will likely be redressed by an injunction that requires EPA to comply with FACA and that prevents EPA from using the product of those violations. It is clear that they will be.[3]

[3] Defendants seem to argue that an injunction against the use of the BBWA would not redress any of Plaintiff's injuries. That argument makes no sense. EPA concedes that the

Finally, Plaintiff's interest in a fair and open proceeding regarding the development of Pebble Mine—that is, its interest in *this* case—plainly falls within the "zone of interests" that FACA protects. This, too, follows naturally and logically, once one acknowledges, as Defendants seem loathe to do, that FACA is not just a cost-cutting statute. Its purpose is to assure that the government is not influenced by biased advice and recommendations and that the process by which federal agencies seek and obtain advice and recommendations from advisory groups is exposed to the light of day. Further, as the Ninth Circuit has observed, "the zone of interest test is 'not meant to be particularly demanding.'" *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 852 (9th Cir. 1989) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). The test is used simply to determine whether the plaintiff's interests more than marginally relate to the purpose implicit in the statute at issue. *Id.* at 852. That is surely the case here. Indeed, Plaintiff's claims land in the dead center of FACA's zone of interests. *See Idaho Farm Bureau*, 900 F. Supp. at 1364 ("Clearly, Plaintiffs' asserted injury, *i.e*. that the FACA violations resulted in a biased recommendation from the committee, falls within the 'zone of interests' protected by the FACA."); *Idaho Wool Growers Ass'n*, 637 F. Supp. 2d at 873-74 (stating, where plaintiffs alleged agency's failure to follow FACA in forming and operating

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BBWA is at the heart of its pending § 404(c) proceeding. Plaintiff claims that the BBWA is flawed precisely because it was prepared in violation of several of FACA's provisions. If Plaintiff prevails on that claim, then enjoining EPA from using the flawed BBWA in its § 404(c) proceedings seems like the *only* logical way to redress the harm. "If the courts do not enforce FACA by enjoining the work product of improperly constituted committees, FACA will be toothless, merely aspirational legislation." *Cargill, Inc. v. United States*, 173 F.3d 323, 341 (5th Cir. 1999). Likewise, Defendants' "breathtaking magnitude" argument—that a "use injunction" against the BBWA for all purposes would not redress Plaintiff's harm—is nonsensical. Defs.' Mot. at 23-24. Plaintiff is concerned here with the FACA violations that affect EPA's ongoing § 404(c) proceeding and with EPA's reliance on the BBWA in that proceeding, not with some future proceeding having nothing to do with Plaintiff or Pebble Mine in which EPA may want to use the BBWA for some other purpose.

committees and sought to prevent the use of committees' reports going forward, "it is this denial of [FACA] rights that represents the predicate injury to confer standing"; rejecting argument that plaintiffs had not suffered "imminent and concrete harm," and stating: "This argument . . . ignores the fact that the Forest Service's alleged failure to follow FACA . . . has already denied [plaintiffs] their procedural rights to participate in the Committees. These denied rights constitute the requisite injury to confer standing here.").

Defendants do not seriously challenge any of this, and nothing in their motion directly addresses the actual allegations of the Amended Complaint measured against the legal standards that govern. Rather, Defendants argue that, notwithstanding Plaintiff's allegations of injury, causation, and redressability, the Court should conclude *as a matter of law* that Plaintiff was not injured and thus has no standing. At the end of the day, Defendants argue, Plaintiff's interest in EPA's "public accountability" was fully satisfied not because EPA complied with FACA, but rather because EPA provided Plaintiff with opportunities to participate in public meetings and to submit data and other information to EPA regarding the Pebble Mine. Plaintiff, of course, disputes virtually everything that Defendants claim about Plaintiff's participation in EPA's purportedly open and transparent process here. Indeed, the Amended Complaint makes clear that EPA's transparency and openness were, and always have been, a charade. *See, e.g.*, Am. Compl. ¶¶ 48, 49, 53, 54, 70-73, 76, 77, 83, 95, 102, 106, 113, 114, 130-132, 138-140. The agency's decision to proceed with a veto under § 404(c) had been made long ago—certainly before the native tribes purportedly spurred EPA into action—and EPA's alleged attempts to include Plaintiff in the "process" were purely pretextual and little more than window dressing.

But, again, that is not the point. Here, Plaintiff claims that it has been deprived of the benefit of FACA's procedural guarantees. Injury, for standing purposes, is, in effect, immediate and implied as a matter of law, regardless of Defendants' effort to be excused of their violations of the law by *post hoc* conduct. *Cf. Ala.-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1106 (11th Cir. 1994) ("Because FACA's dictates emphasize the importance of openness and debate, the timing of such observation and comment is crucial to compliance with the statute. Public observation and comment must be contemporaneous to the advisory committee process itself."). Moreover, Defendants' argument that Plaintiff's participation in EPA's public proceedings somehow deprives Plaintiff of standing is misguided.[4] The Amended Complaint makes clear that Plaintiff is complaining less about what took place in public,[5] but rather about what was happening behind closed doors between the agency and its *de facto* advisory committees that were stacked with special interests uniformly aligned against Plaintiff and any plan to develop the Pebble Mine. It is what Plaintiff did *not* know that is at the heart of this case. It is EPA's *exclusion* of Plaintiff (and many others) from the agency's behind-the-scenes maneuverings that is abhorrent, flatly inconsistent with FACA, and actionable. Failure to provide Plaintiff with an opportunity to participate contemporaneously in EPA's decision-making to the *full* extent allowed by law "constitutes a sufficiently distinct injury to provide

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[4] Defendants argue that "[n]umerous courts have held that public participation in agency decision-making may render harmless prior FACA violations." Defs.' Mot. at 20. However, Defendants acknowledge that the cases relied upon are not in the context of an inquiry into standing. *Id.* at 21. Any decision about the scope of an appropriate remedy is obviously premature and, more importantly, unrelated to standing.

[5] To be sure, in addition to being excluded from the private process, Plaintiff (and others) were also excluded from the public process in certain important ways, such as by EPA's limiting Plaintiff's ability to submit comments while at the same time accepting comments and analyses from the anti-mine forces outside of official comment periods. Am. Compl. ¶¶ 76, 77, 113, 114.

standing to sue." *See Pub. Citizen*, 491 U.S. at 449 ("[R]efusal to permit appellant to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue.").

The Court's inquiry into Plaintiff's standing does not require resort to an auditor's pen, meticulously scouring the Amended Complaint to see whether there may exist an allegation or two that reveals that Plaintiff participated in a particular meeting or public hearing. The fact is that there is simply no basis for the Court to conclude *as a matter of indisputable fact and law* that Plaintiff has not been injured sufficiently to have standing. Indeed, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561 (second alteration in original) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 479 U.S. 871, 889 (1990)); *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012-13 n.3 (1992) (stating "*Lujan*, since it involved the establishment of injury in fact at the summary judgment stage, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury in fact been made at the pleading stage, it would have been unsuccessful.").

Finally, it is by now clear that Plaintiff's right to participate in EPA's advisory committee proceedings as guaranteed by FACA is not—contrary to Defendants' argument—the only interest that FACA serves or that was violated here. FACA also makes expressly clear that advisory committees must be fairly balanced in their membership and that their advice and recommendations must not be influenced by special interests. 5 U.S.C. App. II § 5(b)(2), (c). Defendants wholly ignore these important interests—interests that were also violated by Defendants' conduct and that also can be redressed by the relief that Plaintiff has sought.

Plaintiff has met all the requirements for standing under Article III and FACA.

IV. PLAINTIFF HAS STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiff has adequately pled facts that define each *de facto* advisory committee; how it was formed; its membership and purpose; the nature of the advice and recommendations that it provided to EPA; EPA's management and control of the committee; and how the advisory committee failed to comply with FACA. At this stage in the proceeding, nothing more is required. As with their standing argument, Defendants' argument that Plaintiff has failed to state a claim is without any merit.[6]

A. The Governing Legal Standards

Plaintiff's case should not be dismissed under Rule 12(b)(6) unless Defendants show "beyond doubt" that Plaintiff can prove no set of facts in support of its claims that would entitle it to relief. *See Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011) (citing *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1138 (9th Cir. 2003) (reversing dismissal)). If the

[6] Defendants' Rule 8 argument, Defs.' Mot. at 47, is also meritless. Plaintiff drastically reduced the length of its original complaint. In the 26 pages of factual allegations in the Amended Complaint (at 6-32), Plaintiff describes three advisory committees and the necessary elements of the FACA claims as to each, with only a brief sampling of facts to support each allegation. Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The hallmark of compliance with Rule 8 is whether the complaint "'give[s] the defendant fair notice of what the . . . claim is and the grounds upon which it rests . . . .'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1130 (9th Cir. 2011) (rejecting Rule 8 attack because movant did not "assert that the complaint fails to set forth cognizable causes of action, that the legal theories are incoherent, or that [one] cannot tell which causes of action are alleged against which Defendants."). Every complex case requires a balance between providing a defendant with sufficient notice to respond and providing a "short and plain" statement that meets Rule 8's requirements. Plaintiff submits that it has properly struck that balance here and that Defendants should no longer be heard to argue that the claims are "incoherent" or that answering the Amended Complaint will be too burdensome.

allegations in the complaint "'plausibly suggest an entitlement to relief,'" then the motion must be denied. *See Harris v. Amgen, Inc.*, 770 F.3d 865, 874 (9th Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) and *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (quoting *Iqbal*)) (reversing dismissal). In evaluating whether Plaintiff's claims meet this standard, the Court must accept as true all factual allegations in the Amended Complaint and draw all reasonable inferences in Plaintiff's favor. *Aguayo*, 653 F.3d at 917.

Here, this Court has already ruled that Plaintiff is likely to succeed on the merits of its FACA claims (or, at the very least, that substantial questions were raised about those claims) with respect to one of the alleged *de facto* advisory committees—the Anti-Mine Assessment Team, which included the Inter-Governmental Technical Team (the "IGTT"). This ruling, of course, cannot be squared with Defendants' argument now that Plaintiff has failed to state a claim regarding this advisory committee, particularly given that Defendants have not raised any new legal arguments. Further, although the Court declined to base the preliminary injunction on a similar finding regarding the two other *de facto* advisory committees that Plaintiff alleged—the Anti-Mine Coalition and the Anti-Mine Scientists—the Court did *not* rule that there was no set of facts on which Plaintiff could prevail regarding the FACA claims applicable to them. Thus, even if the Court remains uncertain (or even skeptical) about the merits of Plaintiff's FACA claims with respect to two of the FACs alleged, that is not legally equivalent to concluding that Plaintiff has failed to state a claim under Rule 12(b)(6).[7] Indeed, Plaintiff's Amended Complaint states claims regarding *each* of the FACs, and that is sufficient to deny Defendants' motion.

[7] Defendants assert that *Washington Toxics Coalition v. U.S. EPA*, 357 F. Supp. 2d 1266 (W.D. Wash. 2004) is "directly on point." Defs.' Mot. at 27. It is not. First, that case was decided on a summary judgment standard, which is obviously different from the standard applicable to a motion to dismiss under Rule 12(b)(6). Second, *Washington Toxics* is

B. The Anti-Mine Coalition FAC

Plaintiff alleges that EPA established or utilized a committee formed of individuals from a group of anti-mine special interest groups in the interest of obtaining advice and recommendations regarding the agency's § 404(c) and BBWA initiatives. Am. Compl. ¶¶ 31, 36-39. EPA organized this group and directed its members to the relevant points of contact at the agency, such as Richard Parkin, the BBWA team leader, and EPA "sought information directly from these parties" "because they possessed certain expertise." *Id.* ¶¶ 42-74. EPA met many times with the group, *e.g.*, *id.* ¶¶ 43, 44, 46, 50, 55, and, as EPA correctly acknowledges, "[a] group that meets only once can still be subject to FACA." *Groups Subject to FACA*, http://www.epa.gov/ocem/faca/hb/hb7.htm (last visited Feb. 17, 2015).

EPA argues that the fact that the members of the Anti-Mine Coalition collaborated with one other beforehand is inconsistent with EPA having established or utilized them as an advisory committee. Defs.' Mot. at 29-30. This is not so. That members of the Anti-Mine Coalition collaborated before FACA was triggered is not surprising, given that the people involved have

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distinguishable in many ways, not the least of which is that the alleged advisory committee in that case was actually seeking advice and guidance *from the EPA*, the opposite of what FACA requires. *Wash. Toxics Coal.*, 357 F. Supp. 2d at 1269, 1273-74. Here, Plaintiff alleges the EPA has admitted that it "sought information directly from these parties [the members of the Anti-Mine Coalition FAC and the Anti-Mine Scientists FAC] because they possessed certain expertise"; the members of these two FACs "provided information to EPA in the form of scientific papers, presentations, research, data, and overall strategy and recommendations"; and "[s]ome of the information was useful to the EPA and assisted the EPA in developing the BBWA[.]" Am. Compl. ¶¶ 74, 111; *see also* Defs.' Mot. at 13 ("At various times, the EPA received substantive, scientific information from these outside parties, some of which the EPA solicited."). Plaintiff has alleged that the committees here were formed or managed by EPA; at least the Bristol Bay Assessment Team was publicly funded; EPA personnel were members of the FACs; the purpose of the FACs, as dictated by EPA, was to provide advice and recommendations to EPA to support its § 404(c) and BBWA initiatives; and the information provided to EPA was intended for EPA's use.

been anti-mine activists for many years, working together to find ways to scuttle the Pebble Mine.

But once EPA took the helm in 2009, it made clear that it would lead the anti-Pebble charge using its Clean Water Act authority and drawing on the activists' resources. At that point, the agency organized the anti-mine coalition into an advisory committee and utilized the committee extensively. There is nothing inherently inconsistent with FACA in finding that a group that was once loosely connected had evolved into an "advisory committee." *See, e.g.*, Am. Compl. ¶¶ 31, 32, 43, 44. In fact, case law looks to whether the members of the advisory committee interacted as evidence of the group nature of the committee's advice and recommendations. *See, e.g.*, *id*. ¶¶ 34, 46, 49, 51, 54, 59, 60, 62, 63, 72, 73, 82, 83, 101, 102, 104; *see Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993) (the FACs in the instant case were no mere "collection of individuals who do not significantly interact with each other" which might be a circumstance that does not trigger FACA); *Ctr. for Auto Safety v. Cox*, 580 F.2d 689, 693-94 (D.C. Cir. 1978) (stating that "it makes no difference whether the committee is . . . a pre-existing group. . . . [W]e find nothing in the regulatory scheme of the Act to suggest that Congress intended to exclude organizations fitting the definition of advisory committee from coverage simply because they have an existence independent of the agency utilizing them.").

The members of the Anti-Mine Coalition coordinated their efforts, *e.g.*, Am. Compl. ¶¶ 34, 82, and by 2009, EPA's Phil North engaged with The Nature Conservancy ("TNC") personnel to discuss "how we might be able to support each other or collaborate with our work." *Id.* ¶ 57. Collaboration with the ENGOs (Environmental Non-Governmental Organizations) was fueled by the fact that, as EPA told Trout Unlimited ("TU") and other Anti-Mine Coalition

members at meetings with EPA Region 10 officials in April 2010, Pebble was a "priority" for Administrator Jackson, and EPA "look[ed] forward to hearing more from [TU] soon about what they can do to help." *Id*. ¶ 93. Following this meeting, EPA's North told TU's Brown to bring "technical people"—*i.e.*, the Anti-Mine Scientists—to follow-up meetings with EPA headquarters officials. *Id*.

By this time in 2009 and into early 2010, EPA's North was secretively working with several of the Anti-Mine Coalition members to advance the first prong of EPA's agenda: initiate § 404(c) proceedings preemptively. Using his personal email as a conduit to at least Jeff Parker and his Native Alaskan Tribe clients, North and Parker ginned up the Tribes' petition—the ruse on which EPA claims it acted to move forward with § 404(c).

But EPA's public face had another side. As alleged, the entire § 404(c) and BBWA process was a charade—a pretext that renders any claims of "curing" the FACA violations by virtue of the "public process" disingenuous, at best. *See id*. ¶¶ 48, 49, 53, 54, 70-73, 76, 77, 83, 95, 102, 106, 113, 114, 130-132, 138-140. One illustrative example is that EPA put Phil North in charge of designing the hypothetical Pebble Mine on its official Bristol Bay Assessment Team. North, who has stated that § 404(c) was necessary, proceeded—with the blessing of EPA management and the assistance of the Bristol Bay Assessment Team and the BBWA Mining Work Group—to conceive a mine that would never be constructed in modern mining. North imagined an outdated mine with *no* mitigation measures, thus guaranteeing that the BBWA would conclude that the mine would cause unacceptable adverse effects. These findings then provided the statutory prerequisite for the § 404(c) action. This ploy was backstopped by using only anti-mine scientists as resources for the BBWA analysis and ensured that the end product

would be a biased report—precisely the sort of committee product FACA was enacted to prevent.

EPA next asserts that Plaintiff has not alleged any facts that support that the Anti-Mine Coalition provided EPA with "group advice." Defs.' Mot. at 30. As an initial matter, because this *de facto* advisory committee was uniformly anti-mine and thus plainly violated the "balanced viewpoint" requirement of FACA, *all* of the advice and recommendations were by the "group." The members of this committee marched in lock-step with one another and with EPA; that should be enough to state a claim on this particular point. Nevertheless, as EPA admits, it "sought information directly from these parties [the members of the Anti-Mine Coalition and the Anti-Mine Scientists] because they possessed certain expertise"; the members of these two FACs "provided information to EPA in the form of scientific papers, presentations, research, data, and overall strategy and recommendations"; and some of the "information was useful to the EPA and assisted the EPA in developing the BBWA." Am. Compl. ¶¶ 74, 111; *see also* Defs.' Mot. at 13 ("At various times, the EPA received substantive, scientific information from these outside parties, some of which the EPA solicited."). Moreover, Plaintiff has alleged that the group provided advice and recommendations to EPA, all of which reflected the group members' coordinated, collective views on the two central issues: using § 404(c) to stop the mine, and directing the BBWA to a conclusion supporting the § 404(c) action. *E.g.*, Am. Compl. ¶¶ 36, 39, 43, 44, 46, 52-54, 58, 59, 61-62.

EPA relies on cherry-picked examples from previous filings to suggest that the advice from the members was not "group advice." Defs.' Mot. at 30-31. But this fails. While there certainly are scattered examples of individuals conveying advice to EPA, that advice was almost always the collective recommendation of the group members who coordinated at the behest of

EPA. *E.g.*, Am. Compl. ¶¶ 46, 49, 51, 53, 63, 67, 72. Indeed, EPA's examples, *see* Defs.' Mot. at 31 nn.20-22, undercut its own argument. For example, Plaintiff alleges that Anti-Mine Coalition members (i) "commissioned technical experts to provide scientific data and expert opinions to EPA in preparation of the [BBWA]," Am. Compl. ¶ 62; (ii) coordinated meetings between the Bristol Bay Assessment Team and others from EPA with Anti-Mine Coalition and Anti-Mine Scientists to receive advice and recommendations based on a secret "embargoed" risk assessment, *id.* ¶¶ 53, 54; (iii) distributed reports reflecting "collective views" from Anti-Mine Coalition and Anti-Mine Scientists, characterized as "very pertinent to discussions about use of 404(c)" by BBAT team leader Parkin, *id.* ¶¶ 107, 108; and (iv) provided group comments critiquing the external peer reviewers' criticisms of the draft BBWA, *id.* ¶ 98. This, too, is sufficient to state a claim under the governing standards.

Defendants also argue that EPA did not select the membership of the Anti-Mine Coalition. Defs.' Mot. at 31. Of course, an advisory committee can exist whether or not it was formally established by EPA. But Defendants ignore that Plaintiff has alleged that EPA did, in fact, select and organize the members of this group, *e.g.*, Am. Compl. ¶¶ 42-44, 57, and that membership was determined in part by EPA's decision to exclude others. *Id.* ¶¶ 47-49, 54, 55, 57, 63-66, 71, 74, 76. The power to exclude those with unwanted views from a committee's or group's membership *is* (as EPA concedes on its FACA web site) evidence of "actual control" under even Defendants' overly strict reading of "utilized." *See Wyoming v. U.S. Dep't of Agric.*, 201 F. Supp. 2d 1151, 1157 (D. Wyo. 2002) (holding plaintiff sufficiently pled that defendants "utilized" committee under FACA where it alleged that government controlled committee by not granting cooperating-agency status to states that requested participation), *vacated on other grounds*, 414 F.3d 1207 (10th Cir. 2005).

In addition, Defendants assert that Plaintiff has not pled "actual management or control" in the sense that "EPA must control what is discussed at advisory committee meetings." Defs.' Mot. at 32. Establishing the agenda is one indicium of management or control, and this *has* been alleged. *See, e.g.*, Am. Compl. ¶¶ 38, 39, 41, 45, 46, 50-55, 58, 59, 61-63, 72-74; *Groups Subject to FACA*, EPA, http://www.epa.gov/ocem/faca/hb/hb7.htm (last visited Feb. 17, 2015) ("Criteria considered in determining whether the federal government exercises actual management or control include whether a federal agency selects (or controls the selection of) members, sets the agenda, and/or funds the group's work."). Again, EPA conflates what is required by FACA in the case of a properly established advisory committee with what must be shown to establish that an agency has impermissibly availed itself of a committee and its recommendations in violation of FACA. *Public Citizen* does not say that management or control means showing that the committee was doing what would be required of it by the statute (*e.g.*, submitting a charter, etc.); if the committee was doing what was required of it (*e.g.*, agendas approved by the federal designated officer), it would be *complying* with the statute. That is not the case here where *de facto* committees are at issue. Plaintiff has alleged that EPA managed or controlled the committee it established or utilized, including by establishing agendas, organizing and chairing meetings, and dictating what information it wanted from the Anti-Mine Coalition. *See, e.g.*, Am. Compl. ¶¶ 46, 52-54, 59, 67, 70-74.

Furthermore, many EPA documents that Plaintiff received to date were redacted or withheld in their entirety under the "deliberative process" exemption to FOIA, including many documents concerning advice and recommendations given by the *de facto* advisory committees. It seems inconsistent, if not disingenuous, for Defendants to claim that these documents reflect deliberations that do not have to be disclosed under FOIA while simultaneously arguing that

Anti-Mine Coalition and the Anti-Mine Scientists were merely independent individuals who were unilaterally providing their unsolicited views to EPA. In addition, although Plaintiff has sufficiently pled facts to state its claims, it believes that documents showing more extensive management and control have been withheld during the FOIA process. *See id.* ¶¶ 27, 28, 75, 112; *see also* Complaint, *Pebble Ltd. P'ship v. U.S. EPA*, Case No. 3:14-cv-00199-JWS, ECF No. 1 (D. Alaska Oct. 14, 2014) (FOIA action). EPA solicited advice and recommendations, as it has admitted, and co-drafted memos to ensure that their conclusions were suitable to further its scheme to invoke § 404(c), *e.g.*, *id.* ¶¶ 64-66. EPA's select few examples do not, as a matter of law, establish that Plaintiff has failed to state a claim as to the Anti-Mine Coalition FAC.

C. The Anti-Mine Scientists

EPA's arguments against the Anti-Mine Scientists fail for the same reasons as do its arguments against the Anti-Mine Coalition: Plaintiff has pled all the required elements and supported those allegations with facts.

The members of the Anti-Mine Scientists advisory committee coordinated amongst themselves, were established or utilized by EPA to provide advice and recommendations, and provided group advice and recommendations. *See, e.g.*, Am. Compl. ¶¶ 83, 86-88, 90-93, 95, 97-111. EPA utilized the group, set the agenda, and solicited specific advice and recommendations for its § 404(c) strategy, including by asking for scientific support for the BBWA to help counter criticism of EPA's scheme. *Id.* EPA also selected the members proactively, excluding those with pro-mine views. *E.g.*, *id.* ¶¶ 94-96, 102, 109, 111, 113, 114.

EPA "sought information directly" from the Anti-Mine Scientists because its members "possessed certain expertise"; the members "provided information to EPA in the form of scientific papers, presentations, research, data, and overall strategy and recommendations"; and

EPA used the information "in developing the BBWA." Am. Compl. ¶ 111; *see also id*. ¶ 110; Defs.' Mot. at 13. This includes, for example, arranging briefings with the Anti-Mine Scientists about "coordinated science research related to fisheries of Bristol Bay and their relation to the [Bristol Bay Assessment]", Am. Compl. ¶¶ 105, 109; circulating the research to the BBAT, including directing it to the "right folks on the [BBAT] team", *id*. ¶¶ 97, 102, 104; citing the research in the BBWA, *id*. ¶¶ 95, 103; critiquing the external peer reviewers' criticisms, *id*. ¶ 98; obtaining "literature compilations" that the "coalition [was] working on", *id*. ¶ 101; and setting up meetings to receive advice and recommendations from the scientists concerning their secret "embargoed" reports, *id*. ¶ 106. In the words of Anti-Mine Scientist Thomas Yocom to Regional Administrator Dennis McLerran and committee members Shoren Brown, Wayne Nastri, and Tiel Smith, "[w]e did our best *to share our collective views on these Questions based on our decades of work at EPA on these very issues*[.]" *Id*. ¶ 107 (emphasis added); *see also id*. ¶ 108.

The Amended Complaint is sufficient to state a claim with respect to the Anti-Mine Scientists.

D. The Anti-Mine Assessment Team

The Anti-Mine Assessment Team is, in reality, made up of two committees: EPA's Bristol Bay Assessment Team ("BBAT"), established by EPA to develop and promulgate the BBWA, *see* Am. Compl. ¶¶ 122-140, and the IGTT, established by EPA to provide EPA with technical advice and recommendations on the BBWA, *see id.* ¶¶ 141-152.[8]

As this Court has already suggested, these committees possess the hallmarks of federal advisory committees. Thus, Defendants' arguments that Plaintiff's allegations are conclusory or

[8] The BBAT was led by EPA's Richard Parkin. Am. Compl. ¶ 121. EPA, through Parkin, Smith, Eckman, and Fordham, also ran the IGTT. *See id*. ¶ 143.

that the committees "bear no resemblance to a FACA committee," Defs.' Mot. at 36, are without merit. So, too, are their arguments that Plaintiff has not pled that the group "had a charter, that it held meetings at which the entire group attended, or that EPA otherwise established or utilized the committee as those terms are used in the FACA context." *Id*. EPA has not—and cannot—dispute that it established these groups or committees. Nor does it matter that the groups had no charter; indeed, *de facto* advisory committees would not be expected to have a charter, given that they were formed, by definition, in violation of FACA.

Having to concede that the Anti-Mine Assessment Team was, in fact, established by EPA, Defendants' arguments are somewhat different from those raised against the first two committees. First, as to the IGTT, Defendants claim that it is exempted from FACA under the Unfunded Mandates Reform Act ("UMRA"), Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.).[9] Then, as to the BBAT, Defendants argue that the use of contractors and Senior Environmental Employment ("SEE") employees also excludes it from FACA's reach. Defendants are wrong.

[9] Defendants also claim that the IGTT did not provide "group advice," but that is directly contrary to the Amended Complaint, which is what controls at this point. Am. Compl. ¶¶ 146-150; *see infra* pp. 26-27; *see also Heartwood v. U.S. Forest Serv.*, 431 F. Supp. 2d 28, 32, 35 (D.D.C. 2006) (finding federal advisory committee existed even though agency asked committee not to make recommendations, each scientist was to work independently or in a small group, and committee had only two meetings with the agency at which scientists provided information on data to be used in the agency's work product).

1. The IGTT

EPA established the IGTT in the summer of 2011 to obtain advice and recommendations for the BBWA, including on technical issues. *E.g.*, Am. Compl. ¶ 141. EPA also managed the IGTT. *Id.* ¶¶ 143-145. The IGTT met as a group on at least August 9-10, 2011, to provide "technical input into the Bristol Bay Watershed Assessment." *Id.* ¶ 147.

Defendants argue, as they did unsuccessfully at the hearing on Plaintiff's preliminary injunction motion, that UMRA excludes the IGTT from FACA's coverage. Defs.' Mot. at 37. UMRA applies only when (1) meetings take place exclusively between federal officials and elected officers of state, local, and tribal governments, or the elected officials' designated employees with authority to act on their behalf, acting in their official capacities; and (2) meetings are solely for the purpose of exchanging views relating to the management or implementation of federal programs that explicitly or inherently share intergovernmental responsibilities or administration. 2 U.S.C. § 1534(b)(1), (2).

UMRA does not apply here because (1) the state representatives were not elected nor were the participants designated to act on behalf of elected officials; (2) EPA has failed to identify any "federal program" at issue here, nor does the BBWA "explicitly or inherently share intergovernmental responsibilities or administration"; (3) the IGTT was convened expressly to provide advice and recommendations to EPA for the purpose of the BBWA, not merely for sharing views; and (4) EPA used the information to exercise authority which is *exclusive to the agency* under § 404(c).

First, the state representatives were agency personnel who were not elected or the designees of elected officials. In *Idaho Wool Growers Ass'n*, 637 F. Supp. 2d at 875-76, the court held that it was not sufficient under UMRA to be a mere state official; the state official, if

unelected, must be acting pursuant to an express delegation of authority of the Governor to act on his behalf as a member of the committee. Defendants have not established that the state or tribal governmental members of the IGTT met that requirement. Moreover, the IGTT meetings were also attended by EPA's non-federal employee BBAT members, who made presentations as part of the "EPA Technical Team," Am. Compl. ¶ 144, and thus the meetings were not exclusively between federal officials and elected officers or their designees.

Second, Defendants have not shown that the BBWA is part of a "national program" run by EPA under § 104(a) of the Clean Water Act, 33 U.S.C. § 1254. Defendants have not named any such national program or pointed to anything that would allow the Court to take judicial notice that such a national program exists. In fact, among other requirements, § 104(a) provides that, if there were such a "national program," the EPA Administrator *shall* form an advisory committee of pollution experts and members of the public to review the progress of research that the EPA essentially commissions. *Id.* § 1254(a)(4). Thus, either EPA failed to create such a committee here, which is evidence that there is no such "national program," or the IGTT *is* the EPA's advisory committee for the BBWA, in which case EPA utterly failed to satisfy FACA.

Third, the IGTT members were brought together under the leadership of EPA's Parkin to provide advice and recommendations to EPA, not to exchange ideas for the members' general benefit. *See, e.g.*, Am. Compl. ¶ 146 (seeking contributions to EPA's assessment); *id.* ¶ 147 (group "brought together to provide opportunities for technical input into the Bristol Bay Watershed Assessment"); *id.* ¶ 148 ("[EPA] will seek your input on whether we have captured the complex relationships in these watersheds and whether we are looking at the correct endpoints for our evaluation."); *id.* ¶ 149 (agenda discussions to provide "feedback to EPA on

approach and assessment information"); *id.* ¶ 150 ("we would like input from the Intergovernmental Team" on high priority pathways).

Fourth, as stated in the BBWA, EPA "launched this assessment to determine the significance of Bristol Bay's ecological resources and evaluate the potential impacts of large-scale mining on these resources. . . . As a scientific assessment, it does not discuss or recommend policy, legal, or regulatory decisions, nor does it outline or analyze options for future decisions."[10] The IGTT was established specifically to give EPA advice and recommendations about the BBWA, which EPA then used to exercise authority that is *exclusive* to EPA under § 404(c). Section 404(c) does not call for any consultation with state officials in its exercise, and there are no shared governmental responsibilities in the management or implementation of EPA's determination rendered thereunder.

In support of its position, EPA cites *Wyoming Sawmills, Inc. v. United States Forest Service*, 179 F. Supp. 2d 1279 (D. Wyo. 2001). Defs.' Mot. at 43. In that case, the Forest Service initiated a consultation process with several agencies and tribes that "became 'Consulting Parties' in the development of a plan for the short-term management of the site until a long-term plan could be agreed on" for the shared intergovernmental management of the Medicine Wheel National Historic Landmark. *Wyo. Sawmills*, 179 F. Supp. 2d at 1287. The Consulting Parties entered into a programmatic agreement "which established interim management procedures and contemplated the development of a long-term plan for managing the site." *Id.* The relevant statute—the National Historic Preservation Act ("NHPA")—provided for

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[10] *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, EPA, at ES-1 (Jan. 2014), http://www.epa.gov/ncea/pdfs/bristolbay/bristol_bay_assessment_ final_2014_vol1.pdf.

"consultation between the Forest Service and other parties to the HPP [historic preservation plan] for any project proposed within an 'area of consultation' surrounding Medicine Wheel." *Id.* As a result, the court held that the consultations concerning the shared intergovernmental management of the site were exempted from FACA under UMRA in light of the fact that the consultations were required by controlling statutes and regulations. *Id.* at 1305-06 ("These consultations . . . fulfill the Forest Service's obligation under the NHPA to consult with the other Federal, State, and local agencies and Indian tribes with respect to preservation-related activities. Therefore, this Court holds that NFS did not violate FACA . . . ." (citation omitted)).

Wyoming Sawmills is inapposite. EPA had no obligation in connection with its § 404(c) proceeding or the BBWA to consult with state and local officials. The consultations with the IGTT were for the sole purpose of providing EPA with advice and recommendations for EPA's purposes. *E.g.*, Am. Compl. ¶¶ 143, 144, 147-150.

2. The Bristol Bay Assessment Team

EPA established the BBAT in December 2010. *Id.* ¶ 121. EPA selected the members of the BBAT, including the non-federal members, managed and controlled the committee, including controlling the agenda, meetings, project schedule, and work product content, and funded the committee. *Id.* ¶¶ 119-129, 135-139. With EPA's Richard Parkin as the leader, the BBAT met as a group, including with the other *de facto* advisory committees alleged, for the purpose of researching, discussing, collaborating on, drafting and revising, and ultimately promulgating the BBWA—the sole basis for EPA's § 404(c) action. *Id.* ¶¶ 120, 121, 123-27, 131-39.

a. The BBAT Contractors Are Subject to FACA

Defendants claim that their use of contractors from NatureServe and ICF on the BBAT does not result in a FACA violation because contractors are not subject to FACA. Defs.' Mot. at

41. But there is no such *per se* rule. Contractors may be exempt, but not where they are managed or controlled by the agency. Defs.' Mot. at 6-7 (citing 41 C.F.R. § 102-3.40(d)); *see also Byrd v. U.S. EPA*, 174 F.3d 239, 246-48 (D.C. Cir. 1999) (assessing whether FACA applies to agency-controlled, contractor-created committee). Here, EPA directly managed the committee including the contractors, convened and ran the meetings, set the agenda, and set the project schedule. Am. Compl. ¶¶ 119-129, 135-139. As Defendants have previously conceded, the non-federal members of the BBAT were utilized "to assist EPA in drafting the BBWA, working directly in collaboration with EPA employees." *Id.* ¶ 123; *see also id.* ¶¶ 120, 121, 127 (EPA's Frithsen stating to BBAT members "Thanks to your hard work sustained over many months, this report provides a comprehensive characterization of the biological and mineral resources of the Bristol Bay watershed, will increase understanding of the impacts of large-scale mining on the region's fish resources, and inform future government decisions related to protecting and maintaining the physical, chemical, and biological integrity of the watershed. . . . Nice job team!").

Further, the non-federal members directly collaborated with EPA personnel, as Defendants previously conceded. *Id.* ¶¶ 120, 121, 123, 136, 137, 139. EPA received data and findings directly from the non-federal members and used those contributions in drafting the BBWA; EPA directly provided to the BBAT data and analyses procured from the ENGOs, including to the non-federal members, for their collective use in preparing the BBWA; and EPA arranged for meetings with other data resources. *E.g.*, *id.* ¶¶ 130-139.

EPA's management and control of the BBAT distinguish this case from others where the contractor serves as an independent intermediary between the agency and the committee. In those circumstances, the agency does not work directly with the committee to create a report to

guide the agency's decision-makers.[11] And whereas EPA claims that if the rule were otherwise, "no government agency could employ contractors . . . without running afoul of FACA", Defs.' Mot. at 42, this is not so. The agency could simply establish the committee in *compliance* with FACA.[12]

In addition, using contractors should not insulate Defendants from FACA where, as here, EPA not only doled out the work assignments, Am. Compl. ¶¶ 136, 138, but also guided and arranged for the retention of the agency's long-time, collaborating scientists, *id.* ¶ 139, in what appears to be a calculated effort to evade FACA. *Id.* ¶ 140 (September 8, 2010, "Bristol Bay 404(c) Discussion Matrix" for "HQ Briefing 9/08/2010" in which EPA acknowledged "Possible FACA complications, however, process could be structured to alleviate those concerns"). *See also Nader v. Baroody*, 396 F. Supp. 1231, 1234 (D.D.C. 1975) (noting consideration of "purpose to evade [FACA]" in connection with assessing characteristics of committee). In such circumstances, procurement regulations, for example, do not provide a check on "waste and other misuses of government resources." Defs.' Mot. at 42.

EPA also claims that the contractors, as a factual matter, were merely providing "operational support" rather than advice. Defs.' Mot. at 42. Notably, EPA abandons its

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[11] Defendants again cite *Tucson Rod & Gun Club v. McGee*, 25 F. Supp. 2d 1025, 1030 (D. Ariz. 1998). In that case, the court found, in *dicta* and without any analysis, that the report of a single contracted expert was not subject to FACA. No explanation is provided of the factual circumstances regarding the issue of management or control by the agency, and the case should carry little, if any, weight in light of the authority cited herein.

[12] For example, EPA's officially listed FAC, "the National Advisory Committee to the United States Representative to the North American Commission for Environmental Cooperation (NAC)," lists as one of its members Mary Klein from contractor NatureServe. *National and Governmental Advisory Committees: Committee Members, EPA*, http://www2.epa.gov/faca/national-and-governmental-advisory-committees-committee-members (last visited Feb. 17, 2015).

argument that the contractors were not providing group advice or recommendations and instead attempts to couch a similar argument in the guise of "operational support." What "support" was provided by the contractors is a factual issue, but, in any event, EPA's select examples do not negate that the contractors were doing far more than providing mere operational support. *E.g.*, Am. Compl. ¶¶ 123, 127, 132-39. Researching, drafting, making policy recommendations, and consulting on project design are not examples of mere "operational support" under any sense of that phrase. In *Heartwood*, the court rejected the same argument in far starker circumstances. *See Heartwood v. U.S. Forest Serv.*, 431 F. Supp. 2d 28, 34 (D.D.C. 2006) ("Advisory panels that support decision makers with data, and not policy advice or recommendations, can be considered advisory committees under the FACA." (citing *Nw. Forest Res. Council v. Espy*, 846 F. Supp. 1009, 1013 (D.D.C. 1994))); *see also Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 420 (D.C. Cir. 1989) (advisory committee recommended technical and scientific criteria for assessing food safety). The court held that "[w]hen a committee is established to provide expert summaries or interpretation of technical data, their reports can be 'in the interest of obtaining advice or recommendations for . . . one or more agencies'." *Heartwood*, 431 F. Supp. 2d at 34 (omission in original) (citation omitted). The court found that "[e]ven though HSEAC provided the USFS with only narrative summaries of scientific information, and made no policy recommendations," its input provided "the framework, context and information that the USFS will rely on in making policy decisions." *Id.* at 35. "Because the USFS has contemplated that the final ecological assessment would play a leading role in developing the forest plan for the Hoosier and Shawnee Forests, the HSEAC provided information 'in the interest of obtaining advice or recommendations for . . . one or more

agencies' and is subject to the FACA's requirements." *Id*. (omission in original) (quoting 5 U.S.C. App. II § 3(2)).

Sofamor Danek Group, Inc. v. Gaus, 61 F.3d 929 (D.C. Cir. 1995), also is inapposite. Defs.' Mot. at 43. First, the issue in that case was whether the agency had even established the advisory committee—not an issue here. EPA, without question, established the BBAT. *See, e.g.*, Am. Compl. ¶ 121; Defs.' Mot. at 3, 35-36 (acknowledging existence of BBAT/IGTT). Further, *Sofamor* is readily distinguishable. In that case, the agency was *prohibited* by Congress from modifying or disapproving the panel's work; the purpose of the information to be developed by the panel was expressly for the benefit of doctors and *not* the agency. *Sofamor Danek*, 61 F.3d at 932, 934. "Here, Congress determined that a clinical practice guideline like the *Guideline on Acute Low Back Problems in Adults* should be developed by and for physicians, educators, and health care practitioners and consumers without the retention of any substantive decision-making authority in the federal government; hence, there was no call for advice or recommendations to be given to the federal government." *Id.* at 938. Notably, the court pointed out that "unlike Congress, a federal agency lacks power to exempt advisory committees from FACA and, hence, its motive in characterizing a committee's goal may, depending on the circumstances, be suspect." *Id*. at 937-38.

Moreover, EPA's assertion that *Sofamor* rejected the contention that a committee could engage in the dual purpose of providing operational support and advice is both inaccurate and inapplicable. *Sofamor* reached no such conclusion. As stated above, the court found that FACA was inapplicable in the circumstances; here, Plaintiff alleged that the BBAT members provided advice and recommendations for the *direct* use of EPA. There is no indirect, dual purpose here. *See, e.g.*, Am. Compl. ¶ 136 (EPA statement to BBAT Mining Workgroup including contractors:

"*Your expertise and participation in this meeting is needed to help the Bristol Bay Assessment team address comments provided by the peer review panel and members of the public. Our objective will to revise [sic] the[n] fine-tune the existing mining scenario for the Bristol Bay Assessment, and to develop alternate scenarios to guide our risk assessment.*" (emphasis added)).

Finally, EPA's assertion that only operational support was provided on the basis of the Frithsen Declaration is as "suspect" as it is meritless. Defs.' Mot. at 43 n.28. The very functions EPA cites are the types of support found to be advice and recommendations. *E.g.*, *Heartwood*, 431 F. Supp. 2d at 34-36. EPA does no more than raise a fact issue—with reference to an affidavit that is not even cognizable on its motion to dismiss. *E.g.*, Am. Compl. ¶ 137.

b. The SEE Program Participants Are Subject to FACA

Two participants on the BBAT, Gary Sonnevil and Dave Athons, were part of EPA's SEE program. *Id*. ¶ 129. Defendants claim that SEE program participants are tantamount to federal employees and do not trigger FACA by their membership in a group that is otherwise made up of federal employees. Defs.' Mot. at 44. Defendants cite no authority for this proposition because there is none. Rather, they argue that, as a matter of policy, groups with SEE members among them should not be considered to fall within FACA.

It is indisputable that FACA does not apply to committees that are comprised solely of federal employees. 5 U.S.C. App. II § 3(2)(C)(i). But, as EPA's website states with regard to this matter, SEE members "**are not federal employees**." *About SEE Program*, EPA, http://www.epa.gov/ohr/see/brochure/backgr.htm (last visited Feb. 15, 2015); *see also* Defs.' Mot. at 44-45 (quoting Senate Report, S. Rep. No. 102-356, at 104 (1992), stating SEE participants are not employees of EPA). Defendants' arguments that the SEE program would

somehow come to a grinding halt or that it would be "absurd" to require committees with SEE participants to be subject to FACA, Defs.' Mot. at 45, should be made to Congress, not to this Court. There is nothing "absurd" about requiring EPA to abide by FACA if it chooses to populate its advisory committees with individuals that, by its own decree, are "not federal employees." At bottom, EPA bristles at the implications of FACA's requirements, but that misses the point: not every committee would have to be chartered, etc. as Defendants protest, only those, such as the BBAT, that are subject to FACA.

V. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

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Respectfully submitted,

/s/ Thomas Amodio

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CERTIFICATE OF SERVICE

I certify that on this 17th day of February, 2015, I electronically filed a copy of the Plaintiff's Opposition to Motion to Dismiss using the CM/ECF system, which will electronically serve counsel for Defendants, RICHARD L. POMEROY, STUART JUSTIN ROBINSON, BRAD P. ROSENBERG, and ROBIN F. THURSTON.

/s/ Timothy Work